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[B-187198]

Travel Expenses—Illness—Distress Due to Illness of Wife, etc.

Employee was notified of sudden serious illness of his wife upon his arrival at temporary duty station. His supervisor determined that employee was incapacitated for the performance of duty by his illness and ordered employee to return to headquarters. In such circumstances, claim for return trip travel expenses may be paid. *Matter of Gary B. Churchill*, B-187198, April 18, 1977, is reversed.

In the matter of Gary B. Churchill—travel expenses—reconsideration, October 3, 1977:

This action is in response to a letter of June 24, 1977, from Mr. Gary B. Churchill, an employee of the National Aeronautics and Space Administration (NASA), requesting reconsideration of our decision *Matter of Gary B. Churchill*, B-187198, April 18, 1977, which disallowed his claim for travel expenses incurred in connection with a temporary duty assignment. Mr. Churchill alleges that the certifying officer's request for a decision contained errors in the chronology of events. He, therefore, feels that our decision was not a proper judgment on his claim and should be reversed.

According to Mr. Churchill's letter, the complete and accurate chronology is as follows. He left his permanent duty station at NASA's Ames Research Center, Moffett Field, California, on May 4, 1976, and traveled by air to the Dallas/Fort Worth Airport to coordinate tests at Bell Helicopter Textron, Dallas, Texas. When he arrived at the airport, Mr. Churchill was paged over the public address system and instructed to call the project resident office in Dallas. He was advised by the resident office that an emergency existed concerning his wife and to call the Good Samaritan Hospital in San Jose, California, for further information. The doctor at the hospital advised Mr. Churchill that his wife had suffered a respiratory arrest and was in the intensive care unit, and that it was not known whether she would live or, if she did live, whether she would suffer significant brain damage. The doctor added that he would not know anything more until that evening.

After conferring with the doctor, Mr. Churchill called the resident office to advise them that he would be arriving after renting a car. He then proceeded to a car rental agency and completed a rental contract. Mr. Churchill states that he believed he would be able to

complete all essential business that afternoon and return to San Jose on the 6 p.m. flight. He does not think he was entirely rational at that point. At the car rental agency, he was again contacted by the resident office and was ordered to return to his permanent duty station because his condition was such that he was not capable of performing his official duties. The agency placed the employee on sick leave on the afternoon of May 4.

Mr. Churchill's letter concludes by requesting that the Comptroller General approve payment of his travel voucher based on the complete chronology. The letter is also signed by the Assistant Division Chief and the Chief Aerospace Engineer showing their concurrence in its contents.

The general rule is that an employee who interrupts or abandons official travel or a temporary duty assignment because of the death or illness of a member of his family may be reimbursed only the cost of the travel to the point of interruption or abandonment. See 47 Comp. Gen. 59, 60 (1967). An exception may be made in cases where the employee has substantially completed the purpose of the travel or where the duties he was to perform are completed at no additional expense to the Government. B-172048, March 29, 1971. Based upon the record in the present case it is clear that Mr. Churchill did not substantially complete his duties and, accordingly, does not fall within this exception to the general rule.

Mr. Churchill contends that he did not abandon his temporary duty assignment for personal reasons. He argues that, as a result of hearing of his wife's emergency condition, he suffered a traumatic experience which, in effect, incapacitated him so that he was unable to conduct the Government's business properly. Mr. Churchill states that his supervisor ordered him home when he realized that Mr. Churchill was unable to perform his official duties due to his highly emotional state. Furthermore, he contends that he was fully prepared to remain at the temporary duty location to complete his assignment, and that it was his "illness" which caused his inability to perform. He cites the fact that he had completed a car rental contract after hearing the news about his wife as evidence that he was prepared to continue with his temporary duty assignment. He also states that his supervisor granted him sick leave and that the supervisor may only do so when he finds that an employee is incapacitated for duty.

Mr. Churchill's argument in essence is that he did not return to his permanent duty station for personal reasons, but was ordered to return by his supervisor "in the best interests of the Government." In his letter of June 24, 1977, Mr. Churchill stated his case in pertinent part as follows:

The purpose of¹ my trip was to participate in Integrated Systems Test Planning for the XV-15 Program. This was a critical point in the program, and there was considerable controversy between the Contractor and the Government as to how the tests should be conducted. It was of prime importance that all participants in the planned meeting be fully capable and performing well. It was obvious to my supervisor that this was not true in my case, and therefore my return was ordered, since my highly emotional state in a somewhat volatile meeting environment could seriously compromise the Government's position.

Based on the above, the early return may be considered from two bases:

1. The traumatic experience incapacitated me for duty, justifying payment of the return trip fare. * * *

2. The early return was for official purposes, in that my condition was such that my presence would compromise the Government's position in conducting its business, and, in the best interests of the Government, I should be sent home.

We have carefully reviewed the facts involved in Mr. Churchill's case and our previous decisions in this area. We believe that the rule that expenses of return travel cannot properly be reimbursed in cases where the abandonment of the temporary assignment and the necessity of the return travel are primarily for personal reasons is proper. Accordingly, we herein affirm the rule.

However, the above rule is not for application in cases where the employee's supervisor or other appropriate agency official determines that the employee is incapacitated due to illness while en route to or at his temporary duty station prior to completion of his temporary duty assignment. In such cases the employee may be authorized return travel to his permanent duty station. See 5 U.S.C. § 5702(b) and Federal Travel Regulations, paragraphs 1-2.4 and 1-7.5b(4). Based upon the additional information furnished to our Office, it appears those conditions have been satisfied in this case.

Accordingly, upon reconsideration, our decision B-187198, April 18, 1977, is reversed, and the claim of Mr. Gary B. Churchill for return trip travel expenses may properly be paid.

[B-189260]

Contracts—Negotiation—Sole-Source Basis—Justification—Delay and Technical Risk Involved

Sole-source award for technical services to incumbent contractor is justified where new contractor, in order to perform services adequately, would have to learn technical history previously available only to incumbent and agency cannot afford delay and risk involved in training a new contractor.

In the matter of the Systems Engineering Associates Corporation, October 3, 1977:

Systems Engineering Associates Corporation (SEACOR) protests the Navy's award to American Communications Corporation (ACC) of a sole-source contract for submarine shipboard electronics design

engineering feasibility studies under request for proposals (RFP) No. N00024-77-R-7170(S) issued by the Naval Sea Systems Command (NAVSEA) on May 6, 1977.

The specification of the RFP describes the scope of work to be "engineering efforts * * * in support of current and future U.S. Navy submarine new construction, modernization, overhaul, and alteration." The contract is to be performed during the period through March 1980.

The Navy states that approximately 86 percent of the work will consist of efforts to support the TRIDENT submarine Command and Control System (CCS) engineering and integration (E&I) project and that ACC is the only contractor which can perform this work within the established schedule. Although SEACOR does not dispute the sole-source procurement of efforts that are unique to the TRIDENT CCS, it asserts that with respect to the remaining 14 percent of the efforts, which are not TRIDENT CCS unique or TRIDENT time critical, the terms and conditions of the RFP are overly restrictive of competition.

SEACOR contends that the inclusion in the specification of generally competitive tasking areas assertedly "well within the scope of SEACOR's expertise" such as engineering/cost analyses for submarine classes other than TRIDENT, participation in various ship system test and alignment programs for various submarine and submarine class programs, and conducting ship alteration engineering feasibility studies on specified submarine and submarine classes, is unjustified and in contravention of the Armed Services Procurement Regulation (ASPR) § 1-300.1 (1976 ed.) requirement to obtain the maximum practicable competition. SEACOR maintains that the non-TRIDENT work should be broken out from any sole-source award to ACC and that the Navy's failure to do so would effectively preclude any possible competition in these areas for as much as three years.

The Navy reports that the contract is to provide technical and management support to six Technical Branches of the Naval Ship Engineering Center (NAVSEC), an element of NAVSEA responsible for technical direction of engineering tasks and evaluation of the resulting E&I efforts performed by the TRIDENT submarine prime contractor, development of technical requirements for the acquisition of advanced electronic hardware and real-time computer software from industry vendors, and analysis of life-cycle support requirements for these equipments and systems. According to NAVSEA, in order for NAV SEC to perform effectively, it requires the most qualified engineering support available from a firm which "must possess (1) technical capability, (2) comprehensive knowledge of the CCS/E&I program, (3) an understanding of technical issues resulting from both previous and current decisions, and, most important, (4) the demonstrated ability

to respond in a timely, accurate and imaginative manner to the plethora of technical and management problems which arise under large, complex programs such as the TRIDENT CCS/E&I effort."

NAVSEA states that the contested work will consist of the application and utilization of the TRIDENT CCS/E&I design approach to ship designs and feasibility studies for related submarine programs, the objective of which is the application of TRIDENT and other state-of-the-art technology to plans for the development of a new attack submarine and for the modernization of the SSN 688 [Los Angeles] class of attack submarines. Although none of these new programs has a concrete development schedule, NAVSEA states that intensive initial planning is underway and NAVSEC is receiving urgent requests for technical evaluations and feasibility studies from high level planners within the Department of Defense, which evaluations and studies apply and build upon Navy-approved TRIDENT submarine designs. In order to respond to these requests, NAVSEC reportedly requires support from a contractor who has "the essential experience in submarine combat systems engineering, unique computer software expertise, and thorough knowledge of the most advanced technological data available, [as well as] a record of reliability for meeting tight schedule deadlines."

In this regard, the sole-source justification dated January 20, 1977, states in pertinent part :

Effort is a direct follow-on to Contract N00024-76-C-7382 which involves support to six (6) NAVSEC 6170 Technical Branches and PMS 396 Codes. To date, American Communications Corporation (ACC) Personnel have been closely involved in technical investigations of CCS hardware/software system design and integration problems which necessitate NAVSEA/NAVSEC engineering solutions, and have been performing a crucial role in monitoring and evaluating CCS Engineering and Integration efforts being performed by EBDIV/IBM at the CCS Land Based Evaluation Facility. Additionally, ACC personnel are providing vital support to NAVSEA/NAVSEC in the technical management of the CCS program, specifically involved with program planning, examination of program risk factors, and assisting in implementation of program activities. NAVSEC 6170 considers it imperative that ongoing engineering and technical analyses of CCS design, development and integration problems be continued by ACC personnel; that the experience and mental data base established in technical, program planning and systems engineering areas be retained and utilized for the benefit of the CCS program. NAVSEA/NAVSEC cannot afford the increased cost of a Learning Curve with its associated Schedule Slippage, particularly since a large part of the efforts identified herein involve detailed knowledge of TRIDENT Submarine electronic systems, subsystems and functions, as well as knowledge of program design and engineering history which now influences and drives program implementation decisions.

We have recognized that the determination to procure by means of a package approach rather than by separate procurements for divisible portions of a total requirement is primarily a matter within the discretion of the procuring activity and will be upheld so long as some reasonable basis for the determination exists. *Control Data Corporation,*

55 Comp. Gen. 1019, 1024 (1976), 76-1 CPD 276; *Capital Recording Company*, B-188015, B-188152, July 7, 1977, 77-2 CPD 10; *Memorex Corporation*, B-187497, March 14, 1977, 77-1 CPD 187. Moreover, as the Navy points out, we have not objected to non-competitive awards of contracts where technical risks and the potential for resulting delivery delays were compelling, *Control Data Corporation*, *supra*; *California Microwave, Inc.*, 54 Comp. Gen. 231 (1974), 74-2 CPD 181; *Hughes Aircraft Company*, 53 Comp. Gen. 670 (1974), 74-1 CPD 137, especially where the sole-source procurement is being conducted to satisfy urgent needs. See *Applied Devices Corporation*, B-187902, May 24, 1977, 77-1 CPD 362.

In this case, the sole-source procurement is predicated on NAVSEA's determinations that ACC is the only contractor with the current capability to provide NAVSEC with the specified contractor support within the time required and that the cost and time which would be required to bring a new contractor up to the level of technical competence ACC has achieved during its 7 years' experience in the TRIDENT CCS/E&I effort renders competitive procurement unfeasible.

As indicated above, SEACOR does not question the sole-source determination with regard to the TRIDENT portion of the contract work. Moreover, based on the record we cannot object to the sole-source determination for the other, non-TRIDENT, work since it is reported that the services in question are currently and urgently needed. The record shows that the Navy cannot afford the delay and risk involved in training a new contractor to perform these services.

Accordingly, the protest is denied.

[B-187079]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Beginning of Occupancy—Thirty Day Period

Transferred employee begins occupancy of temporary quarters at 6:45 p.m. after travel of less than 24 hours. Although he occupies quarters for only one quarter day on first day, that day should be counted as full day in computing temporary quarters allowance. Calendar day is used to compute number of days for which reimbursement may be made. Therefore, maximum reimbursement for first 10-day period is 10 times daily rate (not $9\frac{1}{4}$) since the Federal Travel Regulations, para. 2-5.4c provides for daily rate without proration. 56 Comp. Gen. 15, amplified.

In the matter of the Veterans Administration—computation of temporary quarters allowance, October 4, 1977:

By a letter dated March 22, 1977, Mr. Conrad R. Hoffman, Controller of the Veterans Administration, has requested clarification of

our decision in *Matter of Joseph B. Stepan*, 56 Comp. Gen. 15 (1976), which concerned the proper method of computing the maximum period for which a transferred employee may be reimbursed subsistence expenses while occupying temporary quarters.

In that decision we considered the views of a claimant who contended that para. 2-5.2g of the Federal Travel Regulations (FPMR 101-7, May 1973) required that the calendar day quarter on which the employee first becomes eligible for reimbursement of temporary quarters expenses be utilized throughout the period of eligibility to ascertain the intermediate 10-day periods and to determine when the reimbursement should cease. Noting that the governing regulations utilize the quarter day concept to ascertain commencement of eligibility only, we held that the date of initial eligibility constitutes 1 calendar day, and that *thereafter*, reimbursement may be made only in units of whole calendar days.

It is Mr. Hoffman's view that *Stepan* holds that reimbursement of temporary quarters expenses may be made only in units of whole calendar days, regardless of when the employee entered temporary quarters. In light of this view he specifically asks the following:

For example, if an employee, in connection with permanent change of station is in travel status 24 hours or less, arrives at the new duty station at 6:45 p.m. and goes into temporary quarters—is the day in which employee enters temporary quarters considered a whole day for the purpose of computing maximum entitlement for the first 10-day period? In other words, in the example cited would the maximum allowable for comparison purposes for the 1st 10-day period for an employee with spouse and one child be \$566.56 ($9\frac{1}{4}$ days \times \$61.25) or \$612.50 (10 days \times \$61.25)?

In considering the claims of a transferred employee for temporary quarters expenses, it is necessary to distinguish between the time to begin the allowance and the computation of the maximum entitlement. Pursuant to FTR para. 2-5.2g calendar days are used to compute the number of days, up to 30, for which temporary quarters expenses may be reimbursed. On the day an employee performs en route travel and also begins occupancy of temporary quarters under the conditions in the regulation, his entitlement to the temporary quarters allowance begins in the quarter day specified. Also, although occupancy of temporary quarters is for less than a full day following en route travel, such occupancy constitutes 1 of the 30 days for which payment is allowable. However, the fact that temporary quarters are occupied for less than an initial full day does not affect the computation of the maximum allowable. FTR para. 2-5.4c(1) (May 1973) provides for a maximum reimbursement for the first 10 days based on the daily rate without any requirement for proration.

Thus, in the example given in the submission, the employee's eligibility for the first 10-day period would begin on the last quarter of

the first day and would continue for the following 9 days. However, in accordance with FTR para. 2-5.4c(1) the employee is entitled to reimbursement for actual expenses during that period limited to a maximum of 10 times the daily rate of \$61.25, or \$612.50.

[B-187534]

Contracts—Negotiation—Changes, etc.—Specifications—Level of Effort Changes—Not Prejudicial

While agency should have confirmed, in writing, an oral change in recommended level of effort, all offerors were informed of the change and were able to offer on a common basis. Therefore, deficiency was not prejudicial to offerors or Government.

Contracts—Negotiation—Changes, etc.—Specifications—Estimated Manning Requirements Reduced—Reduction of Scope of Work Statement Not Required

Agency was not required to reduce scope of work statement in solicitation when it reduced estimated manning requirements. Contract awarded did not obligate Government to pay an amount in excess of its current funding because Government was obligated to make payments only up to the estimated cost, which was less than the known funding limitation.

Contracts—Negotiation—Auction Technique Prohibition—Disclosure of Funds Available for Procurement

Agency did not utilize prohibited "auction technique" when it informed offerors of monetary amount available for the procurement.

Contracts—Negotiation—Changes During Negotiation—Notification—Failure To Notify Not Prejudicial—

Agency should not have informed one offeror that it had a good chance of award in one region and almost no chance in two other regions, at least not without providing similar assistance to other offerors. However, agency did not prejudice protester, in this case, because offeror who received information as to his relative chances between two regions did not use that information by significantly changing its proposal.

Contracts—Protests—Allegations—Not Supported by Record—Contention That Personnel Exceeded Budget Limitation

Record does not support contention that agency suggested to protester an allocation of personnel which exceeded agency's known budgetary limitations.

Contracts—Protests—Allegations—Not Supported by Record—Improprieties Allegation

Protester's allegation of improprieties occurring at the negotiation session are untimely because they were filed more than 10 days after they occurred.

Contracts—Negotiation—Offers or Proposals—Preparation—Costs Recovery

Claimant is not entitled to proposal preparation costs because agency selection was not arbitrary.

In the matter of Education Turnkey Systems, Inc., October 5, 1977:I. Introduction

Education Turnkey Systems, Inc. (Turnkey) protests the award of contracts under RFP 76-73 (Regions III and V), issued by the United States Office of Education, Department of Health, Education and Welfare (HEW). The RFP requested proposals for furnishing all necessary personnel, supplies, materials and equipment to operate Technical Assistance Centers, which were to provide assistance to state and local education agencies in the use of evaluation models under Title I of the Elementary and Secondary Education Act. The RFP specified that a separate cost-reimbursement contract would be awarded for each of the ten HEW Regions. The RFP provided region-by-region estimates of the professional manpower required to operate the Technical Assistance Centers. Discussions were conducted with those firms in the competitive range, including Turnkey. Thereafter, Turnkey was notified that National Testing Service (NTS) was the successful offeror in Region III and Educational Testing Services (ETS) was the successful offeror in Region V.

Turnkey subsequently protested to this Office upon the following bases: 1) the level of effort specified in the RFP was changed without providing written notice to offerors; 2) the estimated manpower level was reduced without reducing the scope of work; 3) a prohibited "auction technique" was employed when offerors were informed of a specific ceiling amount available for the procurement in each region; 4) competitors were advised of their relative chance of award as between several regions; 5) staffing organization recommended to protester exceeded budget limitations and thus protester received information inferior to that provided to its competitors; 6) cost negotiations were witnessed by persons other than those representing the procuring agency; 7) problems attributable to the agency were blamed on Turnkey, in the presence of potential clients.

II. Discussion of protest**1. Level of Effort Changed Without Written Amendment**

Turnkey first asserts that the level of effort specified in the RFP was changed without providing written notice to offerors. The RFP, as issued, stated that Region Three would require 30 man-months of effort and Region Five would require 41.25 man-months of effort. The offerors were informed, after submission of initial proposals, that due to budget constraints, the level-of-effort would have to be reduced in

order to maintain high standards of staff quality. Written verification of the modification was not provided to the offerors.

Turnkey asserts that the agency, by changing the level of effort specified in the RFP, made a substantial change in the solicitation and thus was required to issue an amendment. Nevertheless, Turnkey concedes that it was aware of the change in the man-hour requirement prior to submitting its proposal. The post-negotiation memorandum indicates that Turnkey was informed of the change on the morning of September 7, 1976, during discussions for Region Three. The awardees, ETS and NTS, were informed of the change respectively on the afternoon of September 7, 1976, and the morning of September 8, 1976. Thus, it appears that Turnkey was aware of the change in the estimated level of effort at least as soon as the successful offerors. Under these circumstances, Turnkey was not prejudiced in the preparation of its proposal, and thus, interference with the award would not be appropriate.

2. Estimated Manpower Requirements Reduced Without Reducing Scope of Work

Turnkey contends that when HEW reduced the estimated manpower requirement, it also should have reduced the Scope of Work. Turnkey asserts that HEW, by reducing the estimated manpower requirement without reducing the Scope of Work, was aware that it was entering into a "cost-overflow" contract. Turnkey also alleges that HEW repeatedly referred to the amount of funds available at the time of negotiations as only "start up" funds.

We do not agree that HEW was necessarily entering into a cost-overflow contract. The payments provision of the RFP (Article 7, Section A of Attachment B) states that:

The Government agrees to pay the Contractor as complete compensation for all work and services performed and materials furnished under this contract, allowable costs as defined in Clause four of the General Provisions in an *amount not to exceed the estimated cost* set forth elsewhere herein. [Italic supplied.]

HEW informed all of the offerors of the limitation on funds available for the procurement so as to receive proposals with estimated costs within that limitation. The contracts actually awarded contained an estimated cost in an amount less than the known limitation of funds. Consequently, the Government did not enter into an obligation to pay at a level higher than its current funding. It was within the agency's discretion to determine whether it wished to retain a broad Scope of Work, while reducing the estimated manpower requirements.

3. Offerors Informed of Budget Limitation on Procurement

Turnkey next contends that the agency utilized a forbidden "auction technique" by informing offerors of the total dollar amount available for the procurement. The protester relies upon FPR 1-3.805-1(b) which states:

Whenever negotiations are conducted with more than one offeror, no indication shall be given to any offeror of a price which must be met to obtain further consideration since such practice constitutes an auction technique which must be avoided.

This Office has held that "the term 'auction' connotes direct price bidding between two competing offerors, not the negotiation of a price between an offeror and the Government, provided an offeror's standing with respect to his competitors is not divulged." 52 Comp. Gen. 425, 429 (1973). In the present case, the agency, by informing the offerors of the funds available for the procurement, did not divulge any offeror's standing with respect to its competitors. Rather, the agency was recommending that the offerors consider whether their initial proposals were "too high," a technique sanctioned by ASPR 3-805.1(b). See 52 Comp. Gen. 425, *supra*. Consequently, it was proper for the agency to notify offerors of the budget limitation on the procurement. Cf. *R.L. Banks*, B-186942, August 2, 1977, 77-2 CPD 66, at 5.

4. Agency Informed Offeror of his Relative Standing in Two Regions

The protester contends that NTS, the awardee in Region Three, was advised during discussions with the agency of its relative standing in Region Five in order for it to become more likely to succeed in Region Three. The post-negotiation memorandum states that: "* * * Dr. Stenner [the NTS negotiator] was told by Dr. Fishbein [the Government representative] to concentrate the best of his staff on Region Three in order to be strong under Region Three where NTS had a very good chance to be awarded the contract, and almost no chance to win under Regions Four and Five."

Paragraph 1-3.805-1(b) of the FPR states that: "* * * no offeror shall be advised of his relative standing with other offerors as to price or be furnished information as to the prices offered by other offerors." Here, the government representative's statement that NTS had a "very good chance" of award in one region and "almost no chance" in two other regions, did not violate the specific prohibition of the above regulation, because the information given to NTS as to its relative chance of award did not necessarily indicate to NTS its relative standing "as to price."

Nevertheless, the negotiating technique employed here could operate unfairly. While the record shows that the awardee was informed of his relative chances in two regions, there is no indication in the record that the agency gave similar information to the protester. The agency should not have afforded only one offeror the advantage which might result from such information, at least not without providing similar assistance to other offerors.

Each situation of this type must be judged in light of the particular circumstances to determine if an unfair competitive advantage to an offeror has resulted. 53 Comp. Gen. 258 (1973). Here, the protester asserts that NTS was able to become more competitive in Region Three because it was informed of its relative chances in Regions Three and Five. However, NTS's best and final proposal does not indicate that it reacted significantly to the information received from the agency regarding its relative chances in Regions Three and Five. The only staff member which NTS shifted from Region Five to Region Three, after discussions, was Mr. Rohlf, whose offered time constituted less than three percent of the total staffing man-hours offered by NTS. Also NTS did not change either its overhead or fixed fee rate between its original proposal and its best and final proposal. Consequently, in the absence of a prejudicial effect on the protester, interference with the contract, which is near completion, would not be appropriate.

5. Staffing Organization Recommended by Agency

The protester contends that the agency favored the awardees by recommending to them staffing organization plans which allowed them to submit the lowest "bid price." The record indicates that during discussions, HEW recommended to each offeror a staffing plan which specified which of the offeror's personnel and what percentage of each member's staff time the offeror should propose to improve the proposal.

First, we must consider whether it was proper for the agency to recommend specific staffing plans to the offerors. This Office has held that certain weaknesses, inadequacies, or deficiencies in proposals can be discussed with a proposer without being unfair to other proposers. 51 Comp. Gen. 621 (1972). There may be instances where it becomes apparent during the course of negotiations that one or more proposers reasonably have placed emphasis on some aspect of the procurement which differs from that intended by the solicitation. In such cases, it could be appropriate for the agency to point out in what respects an offer indicates a misunderstanding by the offeror of the agency's needs. In the present case, the record shows,

and the protester concedes, that the protester received the same type of detailed information as was given to other offerors.

However, the protester alleges that, unlike the awardee, it was unable to comply with the manpower levels stipulated by the agency and still remain competitive in cost. The protester states that the separate notes of its own three negotiators show that the Government suggested the following percentages of staff time for Region Three: Morin, 20 percent; Goldstein, 80 percent; Stimart, 40 percent; Poynor, 20 percent; and secretary, 18 percent. (The use of these figures allegedly would have resulted in a proposal with costs exceeding the specified budget limitation.) HEW has responded that the manpower figures suggested to Turnkey were comparable to those suggested to other offerors and did satisfy the budget limitation. The agency's post-negotiation memorandum conflicts with the protester's notes and states that HEW suggested to Turnkey the following manpower percentages: Morin, 15 percent; Goldstein, 65 percent; Stimart, 31 percent; Poynor, 15 percent; and secretary, 18 percent. Based on the record, we are not convinced that the protester was treated unequally because the post-negotiating memorandum indicated that, like the awardee, the protester received from the agency a recommendation as to how best to allocate its staff within a staffing plan meeting the agency's budgetary limitations. See *Contract Support Co*, B-184845, March 18, 1976, 76-1 CPD 184.

The protester further asserts that the manpower levels recommended to ETS, the awardee in Region Five, enabled it to submit "the lowest bid price of \$112,432." However, the fact that ETS submitted the lowest cost estimate by complying with HEW's manpower levels does not show that the protester was prejudiced thereby. The evaluation criteria for the subject RFP (Article III, Attachment A) specified that technical considerations rather than cost were to be of paramount importance in the award decision. Our review of the record indicates that ETS was selected in preference to Turnkey for reasons other than cost. Consequently, merely because the manpower levels recommended by the agency resulted in ETS having the lowest estimated cost did not give ETS an advantage over the protester. We conclude that the agency did not materially prejudice the protester when it suggested manpower levels to both the awardee and the protester.

6. Improprieties Alleged to Have Occurred at Negotiation Session

The protester has alleged that HEW allowed state education agency representatives to attend the negotiations and that the HEW negotiator criticized the protester, during discussions, in the presence of

the state education agency representatives. The procedures of this Office require that a protest be filed within 10 days after the basis of the protest is known or should have been known, whichever is earlier. 4 C.F.R. 20.2(b) (2) (1976 ed.). Turnkey protested to this Office more than 10 days after the discussions at which the alleged improprieties occurred. Consequently, Turnkey's allegations in this regard are untimely.

Accordingly, the protest is denied.

III. Claim for Proposal Preparation Costs

Turnkey has requested that, if it is not awarded the subject contract, it be allowed "a dollar amount equal to the costs incurred in preparation of all RFP 76-73 proposals." The Federal Courts and this Office have recognized that because bidders and offerors are entitled to have their bids and proposals considered fairly and honestly for award, the costs of preparing a bid or proposal which was not fairly considered may be recoverable in certain circumstances. See *Keco Industries Inc. v. United States (Keco I)*, 428 F. 2d 1233, 192 Ct. Cl. 773 (1970); *Keco Industries, Inc. v. United States (Keco II)*, 492 F. 2d 1200, 203 Ct. Cl. 566 (1974); *Heyer Products Co. v. United States*, 140 F. Supp. 409, 135 Ct. Cl. 63 (1956); *T & H Company*, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345.

In the present case, we do not find that the agency's actions towards the claimant were arbitrary and capricious. Although we have found an instance of questionable negotiating conduct, such conduct did not affect the award determination. Under the circumstances, the claimant is not entitled to reimbursement of proposal preparation costs.

Accordingly, the claim for proposal preparation costs is denied.

[B-173168]

Courts—Judgments, Decrees, etc.—Res Judicata—Subsequent Claims

Shipment under a Government Bill of Lading (GBL) is a single cause of action, and when a court judgment pertains to a particular GBL, the General Accounting Office (GAO) is precluded from considering a subsequent claim on the same GBL under the doctrine of *res judicata*.

Claims—Transportation—Claim Simultaneous With Court Action—Res Judicata Doctrine Applied After Court Adjudication

When GAO makes no representations that it will consider a claim simultaneously submitted to it and a court of competent jurisdiction after the court has adjudicated the claim, GAO is not estopped from applying the doctrine of *res judicata* to the claim.

In the matter of Pan American Van Lines, Inc., October 6, 1977:

By letter of September 16, 1970, Dean Van Lines, Inc., the former name of claimant Pan American Van Lines, Inc., claimed payment from the Finance Center, Transportation Division, U.S. Army, for transportation charges on 12 Government Bills of Lading (GBLs) covering shipments of household goods. That claim was referred to the General Accounting Office for direct settlement. By letter of October 14, 1971, our Office informed Dean that since all the GBLs had been included in suits filed in the Court of Claims, we would take no further action regarding the claim but leave any amounts due Dean to be finally determined by the Court.

Judgment was rendered by the Court of Claims in the suits that contained the GBLs upon which Dean claimed. By letter of December 31, 1975, Pan American again submitted to our Office the original claim but added another GBL that was included in one of the suits covering the original 12 GBLs. We declined to pay the claim on the basis of the doctrine of res judicata by letter of July 6, 1976. On April 28, 1977, claimant requests reconsideration, stating that the doctrine of res judicata was inapplicable to this situation.

The doctrine of res judicata

* * * provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, "Res Judicata", 38 Yale L.J. 299; Restatement of the Law of Judgments, sections 47, 48. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 578-579 (1974).

Parties are bound by a previous judgment on matters that may have been offered to sustain or defeat the cause of action involved in the judgment only if the claim presently being asserted is based on the same cause of action involved in the previous judgment. If the causes of action involved in the previous judgment and present claim are different, res judicata only applies to those issues actually adjudicated in the previous litigation. Pan American argues that the cause of action involved in the original claim and reasserted now is different from the cause of action involved in the Court of Claims' judgments even though the same GBL shipments are involved in both the claim and Court of Claims' judgments. Pan American argues further that the specific issue involved in its claim never was actually adjudicated in the previous litigation.

Container Transport International, Inc. v. United States, 468 F. 2d 926 (Ct. Cl., 1972), shows that the Court of Claims now regards a ship-

ment under a GBL as a single cause of action, regardless of how many different kinds of transportation charges may be involved in the shipment. Therefore, since the GBLs (causes of action) are the same in the prior suits and current claim, Pan American's claim should be denied on the basis of *res judicata* if it is appropriate to apply *Container Transport*.

Before *Container Transport* was decided, the Court of Claims believed that a shipment under a GBL could contain more than one cause of action. See *Great Northern Ry. Co. v. United States*, 312 F. 2d 906 (Ct. Cl. 1963). But *Container Transport* held that the rule in *Great Northern* would not be applied to any case filed after November 10, 1972. Although the suits in the Court of Claims containing the GBL shipments that are the subject of Pan American's claim were filed before November 10, 1972, we do not believe that that fact precludes either the Court of Claims or this Office from applying the "single cause of action" rule announced in *Container Transport*.

The two judgments in the suits in the Court of Claims containing the GBL shipments that are the subject of Pan American's claim were consent judgments which never directly involved the court in adjudicating any issues. These two consent judgments, similar to hundreds of others, were based on a liability finding in two related test suits, *Global Van Lines, Inc. v. United States*, 456 F. 2d 717 (Ct. Cl. 1972) and *Trans Ocean Van Service v. United States*, 426 F. 2d 329 (Ct. Cl. 1970), 470 F. 2d 604 (Ct. Cl. 1973). However, further damage proceedings involving a detailed review of thousands of representative GBL shipments from hundreds of similar suits in the Court of Claims involving household goods had to occur before the consent judgments could be rendered. These further damage proceedings began in 1974 and culminated in the fall of 1975 with the parties to the hundreds of suits stipulating to a formula approved by the court that assigned a standard monetary value to all GBLs that were involved in each suit. It simply was not possible to address each GBL for each of the hundreds of household goods suits that were filed (frequently, there were over 10,000 GBLs involved). Consequently, the representative sampling technique, which specifically determined all the money due for each representative GBL regardless of how many different kinds of transportation charges or related issues were involved, was intended by the parties and the court to settle *all* the issues that were involved in *all* the GBLs in *all* the household goods suits on the basis of the projection made from the representative GBLs. Pan American was awarded \$20 per bill of lading in the consent judgments for each bill of lading which it now claims under. To allow Pan American now to reopen the \$20 amount would reimburse Pan American twice for the same claims and negate the process by which thousands of representa-

tive GBLs were meticulously audited (some of which did involve the situation where a carrier received no payment for services rendered) and used as the basis to determine the amount due for all GBLs in suit.

It is crucial to note that these damage proceedings were undertaken well after the *Container Transport* decision with the object of resolving *all* the transportation issues involved. Therefore, we do not believe that the rule in *Great Northern* has any application to this case where Pan American is unable to say that it relied on being able to litigate separately different aspects of the transportation charges due under a GBL shipment. It is appropriate to apply here the "single cause of action" rule announced in *Container Transport*.

Even though Pan American agrees in its request for reconsideration that the cause of action in the GBLs in the suits in the Court of Claims was "the total amount payable on each bill of lading," it tries to avoid the "single cause of action" rule and resulting application of res judicata by characterizing its claim, involving the same GBLs, as "the erroneous payment of the original amount due" or "wrongful payment" or "improper payment" or "wrongful payments made by a government disbursing office." Pan American confuses a defense or counterclaim belonging to the Government with its underlying cause of action—"the total amount payable on each bill of lading." It does not change Pan American's cause of action even if at some point the Government raises the defense or counterclaim that someone else already has been properly paid for the service for which Pan American is claiming payment. The "single cause of action" rule announced in *Container Transport* is applicable, and Pan American's claim is barred from our consideration by the doctrine of res judicata.

Pan American also asserts that our Office is estopped from applying res judicata because we made representations to it in the letter of October 14, 1971, which it construed to mean that our office would consider the claim once the suits in the Court of Claims were concluded. This assertion is wholly without merit. There is nothing in the letter of October 14 that could be construed to mean that our Office would consider the claim after the Court of Claims had adjudicated it. We quote the last paragraph of the October 14 letter in full:

Since these claims are now within the jurisdiction of the United States Court of Claims for adjudication in the cited cases, no further action will be taken regarding them here, consistent with our policy in such cases. Any amounts due Dean Van Lines will be finally determined by the court.

[B-189578]

Bidders—Responsibility v. Bid Responsiveness Submission of Test Data—Purpose—Competency of Bidder to Perform

Invitation requirement for submission of test data to enable grantee to determine "competency" of bidder to perform contract relates to bidder responsibility, and

bidder's alleged failure to furnish complete test data with bid does not render bid nonresponsive.

In the matter of Cubic Western Data, Inc., October 7, 1977:

On March 28, 1977, the Metropolitan Atlanta Rapid Transit Authority (MARTA) issued invitation for bids (IFB) No. CQ 210 for the design, furnishing and installation of the fare collection system for MARTA's Rapid Rail Transit System. The procurement is to be funded in substantial part (80 percent) by a grant from the Urban Mass Transportation Administration (UMTA), Department of Transportation, pursuant to the Urban Mass Transportation Act of 1964, Public Law 88-365, as amended, 49 U.S.C. § 1601 *et seq.*

Four bids were received in response to the solicitation. Duncan Industries (Duncan), a division of Qonnar Corporation, submitted the low bid of \$3,726,150. The next lowest bid \$3,749,614, was submitted by Cubic Western Data, Inc. (Cubic). MARTA determined that Duncan's bid was nonresponsive and requested UMTA's concurrence in an award to Cubic. UMTA believes Duncan's bid is responsive and disapproved the proposed award to Cubic.

On July 12, 1977, Cubic filed a complaint with this Office against any award to Duncan. On July 25, 1977, MARTA rejected all bids under the IFB because of a purported technical deficiency in the public notice of the advertisement for bids and to avoid "protracted administrative and judicial proceedings and other costly delays." On the following day, Duncan filed an action in the United States District Court for the Northern District of Georgia (*Qonnar Corporation v. The Metropolitan Atlanta Rapid Transit Authority*, Civil Action No. 77-1218A) seeking to compel MARTA to award a contract to Duncan. We then dismissed Cubic's complaint in accordance with our policy of declining to rule on matters involved in litigation in the courts unless the court expresses an interest in receiving our opinion. *Cubic Western Data, Inc.*, B-189578, August 3, 1977, 77-2 CPD 78. Cubic's complaint was reinstated on August 4, 1977, when the court requested this Office to render an opinion "on the question of whether the bid of Duncan Industries should be rejected as nonresponsive." See *Union Carbide Corporation*, 56 Comp. Gen. 487 (1977), 77-1 CPD 243.

UMTA, MARTA, Duncan and Cubic have each submitted briefs to this Office. MARTA and Cubic allege that Duncan's bid is nonresponsive for failure to comply fully with Exhibit J of the IFB which calls upon bidders to furnish test data for the "ticket handler," an important component of the fare collection equipment. Duncan's position is that Exhibit J relates to bidder responsibility, rather than responsiveness, and that the alleged deficiency in its bid was properly resolved

after bid opening. Alternatively, Duncan maintains that even if Exhibit J pertains to responsiveness, it was responsive to Exhibit J requirements. UMTA agrees with MARTA and Cubic that Duncan did not adequately respond to Exhibit J, but views Exhibit J as addressing only bidder responsibility.

At the outset, we point out that this matter does not involve a direct Federal procurement and that the Federal Government will not be a party to the contract awarded. Our function, in a case such as this, is to determine whether there has been compliance with applicable statutory requirements, agency regulations, and grant terms, and to advise the Federal grantor agency accordingly. *Union Carbide Corporation, supra*, and cases cited therein. In view of the court's request, we will limit our review to the question of the responsiveness of Duncan's bid.

The grant requires "unrestricted competitive bidding, and award to the lowest responsive and responsible bidder." The IFB states that "all questions concerning the Contract, * * * including all bids therefor, * * * and the award thereof, shall be governed by and decided according to the law applicable to Government procurement contracts." Pursuant to this provision, the parties' submissions to this Office have been based on Federal procurement law. Accordingly, in resolving the issue, we will rely on the general principles applicable to Federal procurements.

The procurement contemplates the use of a sophisticated ticket handling device as part of the fare collection system. The ticket handler is to accept a magnetically encoded ticket, similar in appearance to a credit card, read the information encoded on the card and emit a signal to open a turnstile and let a passenger through if the ticket is valid. No fare collection system currently in use employs all the features required by MARTA's specifications, but components are available that can be readily modified to meet MARTA's needs. The record also indicates that when MARTA learned that Duncan wanted to compete in the procurement but did not have a suitable ticket handling device actually in service, MARTA agreed to accept test data based on either the actual ticket handler proposed or a "prototype," which Duncan did have.

MARTA regarded the test data accompanying Duncan's bid as falling short of meeting the Exhibit J requirements. However, after bid opening, MARTA obtained additional information from Duncan to the effect that "Duncan's prototype ticket handling device could in fact meet the performance and reliability standards stipulated by the sections of the technical specifications on which Exhibit J was based * * *." The threshold question, therefore, is whether MARTA

may properly consider the information obtained after bid opening. That, in turn, depends upon whether Exhibit J bears upon responsibility of the bidder or the responsiveness of the bid.

It may generally be stated that invitation requirements which concern a bidder's general capacity to perform in accordance with contract terms are matters of responsibility, while requirements directed primarily to the item being procured, rather than to the prospective contractor, concern bid responsiveness. *See* 49 Comp. Gen. 9 (1969). Thus, where a requirement goes to the bidder's experience, it bears on the responsibility of the bidder, while a requirement relating to the precise item being procured must be complied with as a matter of bid responsiveness since it goes to the legal obligation that would result upon acceptance of the bid. 52 Comp. Gen. 647 (1973) ; 48 Comp. Gen. 291 (1968) ; B-175493(1), April 20, 1972.

The distinction between responsibility and responsiveness is an important one because a bid which is nonresponsive at bid opening must be rejected; it cannot be made responsive after bid opening through the submission of additional information. 46 Comp. Gen. 434 (1966) ; 40 *id.* 432 (1961) ; *see* Shnitzer, Government Contract Bidding 237-9 (1976). However, a bid may not be rejected for failure to include information relating to the bidder's responsibility; information bearing on responsibility may be furnished after bid opening. *Allis-Chalmers Corporation*, 53 Comp. Gen. 487 (1974), 74-1 CPD 19; *Concept Merchandising, Inc., et al.*, B-187720, December 17, 1976, 76-2 CPD 505. This is so even where the solicitation states that the information must be submitted with the bid or that the bid will be rejected if the information is not included. *Victory Van Corporation*, 53 Comp. Gen. 750 (1974), 74-1 CPD 178; 52 Comp. Gen. 647, *supra*; *id.* 389 (1972) ; *id.* 265 (1972) ; 48 *id.* 158 (1968).

Exhibit J of the IFB reads as follows:

EXHIBIT J

TICKET HANDLER QUALIFICATION

Bidder shall furnish supporting evidence that the ticket handler specified herein can be supplied as specified. This evidence shall consist of test data furnished with the Bid Document which demonstrates compliance with the basic performance parameters listed below:

A. Transport the specified ticket at a rate sufficient to meet the barrier unlatch time specified;

B. With the condition in A above, write at least 30 bits of magnetic data of the type and of at least the bit density specified, on a single magnetic stripe of the ticket specified;

C. With the condition in A above, read the magnetic data recorded in B above;

D. With the condition in A above, read the magnetic data recorded in B above, and transcribe this data onto the same location on the magnetic stripe during the same ticket pass with the same characteristics required in B above; and

E. Repeat C above and erase all data recorded after reading the data.

Data sheets certified by the Contractor shall be provided with the Bid Documents attesting that each of the above five tests have been performed 1,000 consecutive times without failure or error or deviation from specified limits.

Exhibit J was introduced by paragraph 4.1, which in its original form read as follows:

Each Bidder shall submit the Appendix, forms and Exhibits specified hereinabove [including Exhibit J] to show that he has successfully executed a contract for the design, furnishing, and installation of Fare Collection Equipment of the complexity of this Contract within the two-year period preceding this Bid. Each Bidder shall furnish supporting evidence that the ticket handler specified herein can be supplied as specified. This evidence shall consist of test data furnished with the Bid Documents which demonstrates compliance with the basic performance parameters specified on Exhibit J. Failure of the Bidder to provide complete responses to the forms for the Submittal of Bids so that his competency can be determined may result in his Bid being considered nonresponsive. The duly executed Bid Form, Bid Security, and other specified documents constitute his Bid. Bids shall be submitted as indicated in the Invitation for Bids and on the Bid Form. Bids shall be valid for 60 days after the specified Bid Opening date.

In Amendment No. 1 to the IFB, MARTA changed paragraph 4.1 to read:

Each Bidder in order to demonstrate his qualifications to perform the Contract in a timely and satisfactory manner shall submit the Appendix, forms, and Exhibits specified hereinabove [including Exhibit J] to show that he has successfully executed a contract for the design, furnishing, and installation of Fare Collection Equipment of the complexity of this Contract within the two-year period preceding this Invitation for Bids. Each Bidder shall furnish supporting evidence that the ticket handler specified herein can be supplied as specified. This evidence shall consist of test data which demonstrates compliance with the basic performance parameters specified on Exhibit J. Failure of the Bidder to provide sufficient data so that his competency can be determined may result in rejection of his Bid. The duly executed Bid Form, Bid Security, and other specified documents constitute his Bid. Bids shall be submitted as indicated in the Invitation for Bids and on the Bid Form. Bids shall be valid for 60 days after the specified Bid Opening date.

Duncan argues that the quoted language clearly goes to the bidder's capability to perform and therefore to the bidder's responsibility. It asserts that any doubts in this regard are dispelled by Amendment No. 1 which eliminated certain language having responsiveness overtones, and by the depositions of various MARTA personnel who participated in drafting the IFB indicating their belief that the purpose of the test data submission requirement was to determine bidder responsibility. MARTA and Cubic, on the other hand, concede that the quoted language goes to responsibility in part, but insist that other language in Exhibit J and paragraph 4.1 can only be construed as going to responsiveness. In this connection, Cubic asserts that Exhibit J establishes descriptive data requirements similar to those authorized by Federal Procurement Regulations (FPR) § 2.202-5. compliance with which is a matter of bid responsiveness.

It is, of course, a basic tenet of competitive advertised procurement that the procuring activity's needs and requirements be stated as clearly as possible in the solicitation so that all bidders can discern precisely what is required and so they will be competing on an equal basis. *See* 44 Comp. Gen. 529 (1965); 43 *id.* 544 (1964). When, as here, the meaning of a solicitation provision is the subject of dispute, we believe the interpretation advanced by the procuring activity must be carefully considered since it is normally that activity which is in the best position to set forth what was intended. However, the agency's interpretation is not controlling since it may be unreasonable or inconsistent with the language actually used. Accordingly, it is the language of the solicitation itself which ultimately must provide the answer.

Our decisions are consistent with this approach. For example, in a case somewhat similar to this one, we considered what the agency had intended in determining that the clause in question contained two separable provisions, one going to bidder responsibility and one going to item reliability and therefore to bid responsiveness. *See* B-175493(1), *supra*. In that case, the clause could reasonably be read in accordance with what had been intended by the agency. *See also Western Waterproofing Company, Inc.*, B-183155, May 20, 1975, 75-1 CPD 306. On the other hand, in another case, we held that the provision in question involved only bidder responsibility even though the agency intended the provision to bear on bid responsiveness and had attempted to draft the provision to give effect to that intention. *See* 52 Comp. Gen. 647, *supra*, *id.* 640 (1973), and *id.* 87 (1972).

In this case, of course, there is some dispute as to MARTA's actual intention, since MARTA's official position and the statements in the depositions are somewhat at variance. We need not resolve that particular matter, however, because in our view paragraph 4.1 and Exhibit J can reasonably be read only as going to bidder responsibility.

The purpose of the two provisions is clearly set forth in the opening sentence of the amended paragraph 4.1, which provided that the bidder, "in order to demonstrate his qualifications to perform * * *," was to submit Exhibit J and other forms and appendices "to show he has successfully executed a contract for the design, furnishing and installation of Fare Collection Equipment of the complexity of this contract within the two-year period preceding this Invitation for Bids." Qualifications to perform, of course, involve bidder responsibility, as does the specific 2-year experience requirement. 52 Comp. Gen. 647, *supra*; 39 Comp. Gen. 173 (1959); B-175493(1), *supra*.

Cubic alleges that notwithstanding that first sentence, the next two sentences involve bid responsiveness. Those two sentences, as well as the following one, state:

Each Bidder shall furnish supporting evidence that the ticket handler specified herein can be supplied as specified. This evidence shall consist of test data which demonstrates compliance with the basic performance parameters specified on Exhibit J. *Failure of the Bidder to provide sufficient data so that his competency can be determined may result in rejection of his Bid.* [Italic supplied.]

We do not agree with Cubic. While those two sentences, if considered in the abstract, could arguably refer to the item to be furnished rather than to the bidder's capability to furnish it, we think they must be read in conjunction with the sentences that precede and follow them. The former sentence, as stated above, established the purpose of submitting and complying with Exhibit J. The latter sentence, affirming what is stated in the first sentence, makes it plain that the evidence/test data referred to in the two sentences relied on by Cubic is for evaluation of the "competency" of the bidder, which again is a bidder responsibility matter.

Exhibit J itself merely states, in language virtually identical to that in paragraph 4.1, that bidders are to furnish "supporting evidence that the ticket handler * * * can be supplied," by furnishing test data demonstrating "compliance with * * * basic performance parameters" set forth in the remainder of Exhibit J. While there have been instances where test data requirements involved the item to be furnished and this went to bid responsiveness, see, e.g., *Western Waterproofing Company, Inc.*, *supra*, there is nothing in Exhibit J which leads to the conclusion that the test data was required for any purpose other than that stated in paragraph 4.1; to enable MARTA to determine the competency of the bidder to furnish the ticket handler required. In this regard, we point out that test data requirements do not relate exclusively to bid responsiveness but may also be imposed to enable an agency to determine if a bidder is *able* to furnish the item required. See B-174467, February 4, 1972.

With regard to the statement in Exhibit J that the test data shall be "furnished with the Bid Documents," while we have held that similar statements may be sufficient to place bidders on notice that the requirement involves bid responsiveness, see 37 Comp. Gen. 845 (1958), such statements alone are not controlling and, as stated above, do not preclude the submission of information after bid opening when the requirement properly must be read as concerning bidder responsibility.

See cases cited *supra*, page 20. In light of the precise language of paragraph 4.1, and in view of the deletion of the language originally contained in paragraph 4.1, we do not think it is reasonable to read that Exhibit J statement as by itself establishing a requirement different from that set forth in paragraph 4.1.

Finally, we find no merit to the contention that the test data requirement should be treated as analogous to the descriptive literature requirements of FPR § 1-2.202-5. Descriptive literature is information, generally in the form of design illustrations, drawings and brochures, which shows the characteristics or construction of a product or explains its operation. It is required to be furnished by a bidder as part of his bid to describe the exact product offered. Here, as previously indicated, the test data was required "so that [a bidder's] competency can be determined," not to indicate precisely what would be furnished. In this connection, we note that MARTA viewed as acceptable test data based on prototype equipment which obviously is not the precise equipment that would be furnished under a contract awarded to Duncan. Moreover, we have consistently held that, where as here, there are detailed specifications setting forth the agency's requirements, it is inappropriate to impose the data requirements of FPR § 1-2.202-5 and under such circumstances improper to reject as nonresponsive a bid which does not comply with the data requirements. *See* 48 Comp. Gen. 659 (1969) ; B-174467, *supra*.

The cases cited by Cubic and MARTA involving descriptive literature requirements are clearly distinguishable from this matter involving test results. In *Western Waterproofing Company, Inc.*, *supra*, the data submission requirement was established for the explicit purpose of requiring bidders to provide evidence of the physical compatability of the replacement stone proposed with the existing building stone. In *Transport Engineering Company, Inc.*, B-185609, July 6, 1976, 76-2 CPD 10, the protester's bid was rejected because it proposed indoor-outdoor carpeting rather than hard rubber flooring required by the invitation's specification. In *Atlantic Research Corporation*, B-179641, February 25, 1974, 74-1 CPD 98, the low bid was rejected because the product design indicated in the descriptive literature showed that the item proposed would not conform to the IFB purchase description. *Global Fire Protection Company*, B-185961, July 8, 1976, 76-2 CPD 22, concerned the bidder's failure to show pipe sizes on the bidder's drawing. We find all of these cases inapposite to the situation here.

Accordingly, we concur with UMTA that Duncan's bid is responsive to the MARTA solicitation.

[B-189402]

Contracts—Payments—Progress—First Payment—Inclusion of Total Performance or Payment Bond Premiums

Reimbursement to Government contractors of the total amount of paid performance and payment bond premiums in the first progress payment can be authorized by amending the relevant Armed Services Procurement Regulation and Federal Procurement Regulations clauses to specifically so provide. Such reimbursements are not payments for future performance, but are reimbursements to the contractor for his costs in providing a surety satisfactory to the Government as required by law, and therefore, are not prohibited by 31 U.S.C. 529. Prior Comptroller General decisions, clarified.

In the matter of reimbursements of total performance or payment bond premiums to contractor in first progress payment, October 12, 1977:

This decision is in response to an inquiry submitted by Robert J. Robertory on behalf of the National Research Council, Building Research Advisory Board, Standing Committee on Procurement Policy (BRAB Committee), asking whether our Office would object to revising the Armed Services Procurement Regulation (ASPR) and the Federal Procurement Regulations (FPR) to authorize the consideration of paid performance bond and payment bond premiums in computing progress payments under Government contracts.

Most of the bonds in question are required pursuant to the Miller Act, 40 U.S.C. §§ 270a-270d, which provides, in pertinent part:

(a) Before any contract, exceeding \$2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. * * * 40 U.S.C. § 270a.

Requirements for performance and payment bonds in situations not covered by the Miller Act are set forth in the ASPR § 10-104 (32 C.F.R. § 10-104) and the FPR §§ 1-10.104-2 and 1-10.105-2 (41 C.F.R. §§ 1-10.104-2 and 1-10.105-2).

The BRAB Committee, which is composed of representatives of Federal agencies which do construction, is reviewing on behalf of the Office of Federal Procurement Policy the recommendations of Study Group 13-C of the Commission on Government Procurement: "That the Government pay performance and payment bond premiums to the contractor in his submission of a receipted invoice."

The National Association of Surety Bond Producers and the Associated General Contractors of America support this recommendation on the basis that having to pay an entire bond premium at the time performance and payment bonds are issued, with reimbursement being prorated over the life of the contract, creates cash flow hardships for contractors of limited financial means and, because of the cost of money, results in higher contract prices to the Government. Elaborating on this recommendation, Mr. Robert R. Hume, General Counsel of the National Association of Surety Bond Producers, states in a letter to us:

Surety bond producers are normally required by the terms of their agency contracts with surety companies to make payment of the premium in full within 60 days and, accordingly, they require a contractor to pay the full bond premium within 30 to 45 days after contract award and bond execution, *whether or not* the premium has been paid by the owner. In most instances, this requires the contractor to borrow money to pay such premium, and the cost of such borrowing becomes an expense item included in the contractor's bid, thus making the contract price more costly to the owner.

The general contractor, moreover, has an additional expense in the bids he receives from his subcontractors, unless he pays them the full bond premiums for their subcontractor bonds running in his favor, as the cost of their expense for borrowing to pay bond premiums will be included in their bids to him, and passed on by him in his bid to the owner.

The bonds required by the Miller Act are noncancelable, once executed, whether the premium has been paid to the surety or not, or for any other reason.

A great majority of non-federal contracting authorities, both public and private, have long recognized that performance and payment bond premiums should properly be considered as a mobilization item and, as such, paid in full in the first estimate.

The BRAB Committee also supports the recommendation. However, there is concern, based upon prior decisions of our Office, that a revision of the ASPR and the FPR progress payment clauses to implement the recommendation might be in violation of 31 U.S.C. § 529 (1970), which provides, in pertinent part, as follows:

No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

The submission refers to several of our prior decisions which, directly or in effect, disapproved inclusion of the full amount of bond premiums in initial progress payments under contract clauses (similar to the current standard clauses) providing for progress payments based on "material delivered on the site and preparatory work done * * *." 9 Comp. Gen. 18 (1929); B-112376, December 17, 1952; A-39327, November 19, 1931; A-38974, October 15, 1931. The question presented, particularly in regard to 9 Comp. Gen. 18 and B-112376, *supra*, is whether these decisions were based solely on the terms of the contract clauses or whether they reflect the view that full reimburse-

ment for bond premiums at the outset necessarily constitutes an advance payment in violation of 31 U.S.C. § 529.

The former interpretation is correct. The contracts involved in our prior decisions did not specifically provide for reimbursement of bond premiums as such. Rather, the premiums constituted at most a general element in the contractor's price or cost base. We held that payment of bond premiums did not represent "material delivered" or "preparatory work" within the meaning of the progress payment clause. Thus we concluded that bond premiums were recoverable (indirectly) through progress payments only on the basis, and to the extent, of actual contract performance rendered which qualified under the progress payment clause.

Our decision in B-112376, *supra*, is illustrative. That decision stated in relevant part as follows:

In the present instance, the contractor undoubtedly took the bond premium into consideration in arriving at the unit prices for which he agreed to perform the work, and, hence, as partial payments are made based on the percentage of work completed, as measured by the sum total of the unit prices stipulated to be paid therefor, he is automatically reimbursed for the pro rata part of the bond premium to which he is entitled. By also including the cost of the bond, as such, in the first partial payment voucher in recouping it through deductions on subsequent vouchers in the manner done and proposed, the contractor is, in effect, reimbursed for the entire cost of the bond long before the work has been completed. In other words, the amount of payment is in excess of the amount earned by the contractor under the contract. Thus, the inclusion of the amount representing bond premium, as such, in the payment constitutes an advance of public money, which, in the absence of specific statutory authority therefor, is prohibited by law. See 31 U.S.C.A., § 529; 1 Comp. Gen. 143.

This decision holds only that a contractor may not be reimbursed under the progress payment clause in excess of the amount of the contract price "earned" by performance which qualifies for progress payments. Since reimbursement for bond premiums was not separately provided for, it could only be recovered, in effect, under the progress payment clause on the same pro rated basis as other general elements in the total unit price. The fact that this decision dealt with a payment involving bond premiums was not the decisive factor. The conclusion would have been the same with respect to any general element in the total unit price.

We agree with the submission that 31 U.S.C. § 529 does not preclude initial reimbursement of the full bond premiums if the contract specifically so provides. As the submission points out:

* * * the Government receives the full benefit of the performance bond, and the Government together with subcontractors and laborers the full benefit of the payment bond, immediately upon those bonds being furnished. This is because, in the case of the performance bond, if at any time after the award the contractor should fail to perform, the surety is obligated to underwrite complete performance upon demand by the Government, and the bond is irrevocable. In the case of the payment bond, the Government receives benefits from the date of award because the existence of the bond demonstratively broadens competition for subcontractors

(with resultant lower prices) and because the Government is relieved from harassment by unpaid subcontractors, suppliers, and laborers. The benefits to the Government from the bonds are as real as work performed or materials acquired.

More fundamentally, if reimbursement for bond premiums is specifically authorized by the contract, no "advance payment" is even involved in their full payment upon submission of a receipted invoice. We have long held that 31 U.S.C. § 529 prohibits the compensation of contractors for services which have not been received, so as to avoid the possibility of Government loss in the event the contractor, after receipt of full payment, should fail to perform his contract obligations. *See, e.g.,* B-180713, April 10, 1974, and cases cited. Where the Government undertakes an obligation in the contract to reimburse the contractor for performance and payment bonds, the contractor earns such reimbursement upon obtaining the bonds. In other words, once the bonds have been obtained, the contractor has fully performed his part of the bargain in order to "earn" full reimbursement. There is no further performance for him to render in order to receive reimbursement for the bond premiums.

For the reasons stated above, it is our opinion that 31 U.S.C. § 529 does not preclude the Government from providing in contracts for full reimbursement of bond premiums (where otherwise appropriate) upon presentation of receipted invoices. While not necessarily the only alternative, this could be accomplished by amending the standard progress payment clauses. We note in this regard that the applicable statutes place no limitation on how the progress payments are to be computed, other than that they cannot exceed the unpaid portion of the contract price. *See* 10 U.S.C. § 2307 (1970) and 41 U.S.C. § 255 (1970).

[B-188809]

Officers and Employees—Transfers—Relocation Expenses—"Settlement Date" Limitation on Property Transactions—Extension—Date of Request

Transferred employee reported at new duty station July 1, 1974, and purchased residence December 12, 1975. He did not request extension of 1-year initial authorization period to purchase residence until more than 2 years after his transfer. Paragraph 2-6.1e, Federal Travel Regulations (FPMR 101-7) (1973), requires that the purchase be made within 2 years of transfer, but does not specify time within which request for extension must be filed. His claim is allowed since purchase was made within 2 years and request may be made even after 2 years have passed. 54 Comp. Gen. 553, modified.

In the matter of George F. Rakous, Jr.—reimbursement for real estate expenses—time limitation, October 13, 1977:

This action is in response to an appeal by Mr. George F. Rakous, Jr., an employee of the Department of the Army, from the Settlement Cer-

tificate dated March 18, 1977, issued by our Claims Division, which disallowed reimbursement of real estate expenses incurred by Mr. Rakous in connection with his permanent change of official station from Red River Army Depot, Texarkana, Texas, to Fort Monmouth, New Jersey, in July 1974.

Pursuant to Travel Order No. 437-74 dated May 15, 1974, Mr. Rakous was transferred from the Red River Army Depot to Fort Monmouth. He reported for duty at his new official station on July 1, 1974, and on December 12, 1975, purchased a condominium at his new duty post. Mr. Rakous did not request an extension of time for reimbursement until September 2, 1976, when he requested information concerning a possible extension, stating that he had not made a claim prior to that time as he was unaware that the Government would reimburse such real estate expenses. He was advised by the Finance and Accounting Officer at Fort Monmouth on September 15, 1976, that his maximum period of entitlement had lapsed 2 years after he had reported to his new duty station.

Reimbursement to Federal employees of certain expenses incurred in connection with residence transactions incident to a transfer of duty station is governed by section 5724a(4) of title 5, United States Code (1970), and the regulations issued pursuant thereto. The implementing regulations are contained in part 6 of chapter 2, Federal Travel Regulations (FTR) (FPMR 101-7) (May 1973), and restated for civilian employees of the Department of Defense in Volume 2 of the Joint Travel Regulations (JTR). The provision allowing an additional period of time not to exceed 1 year regardless of the reasons therefor for the sale or purchase of a residence that may be extended by the commanding officer of the activity bearing the cost, or his designee, so long as it is determined that the residence transaction is reasonably related to the permanent change of station, initially appeared in the JTR, C8350, in change 91, dated May 1, 1973. The effective date of that change was October 28, 1972, and applied to any employee who on such date was within his initial year of the transfer or whose effective date of transfer was on or after October 28, 1972. Prior to this date the JTR provided for an extension of the initial 1-year period only under certain conditions not applicable here. It is clear from the foregoing that, at the time Mr. Rakous reported for duty at his new official station in July 1974, the regulatory provision governing the sale or purchase of a residence which allows an additional period of time not to exceed 1 year, regardless of the reasons therefor, had been in effect for almost 2 years.

Section 2-6.1e, FTR, specifically provides as follows:

Time limitation. The settlement dates for the sale and purchase or lease termination transactions for which reimbursement is requested are not later than

1 (initial) year after the date on which the employee reported for duty at the new official station. Upon an employee's written request this time limit for completion of the sale and purchase or lease termination transaction may be extended by the head of the agency or his designee for an additional period of time, not to exceed 1 year, regardless of the reasons therefor so long as it is determined that the particular residence transaction is reasonably related to the transfer of official station.

In the instant case, Mr. Rakous purchased a condominium at his new official station in December 1975, approximately 1½ years after he had reported for duty and within the maximum 2-year period allowed by the regulation. However, his written claim for a 1-year extension of the settlement date limitation to the Commander, United States Army Finance and Accounting Center, was not submitted until December 15, 1976, several months *after* the expiration of the 2-year time limitation set forth in the regulation.

In 54 Comp. Gen. 553 (1975), we concluded that restricting the period during which an employee may make a request for an extension to the initial 1-year period would be unnecessarily restrictive. In that decision, we stated that we had no objection to the agency's approval of the employee's request for a 1-year extension for the sale of his residence not to exceed 2 years from the effective date of transfer "provided the request has been made in writing within the time limitation as required by the regulation." The proviso requiring that the request for an extension be made in writing before the expiration of the 2-year period constituted *obiter dictum*; that is, such statement was not required in reaching a determination in the case as the record showed that the employee had made a written request for an extension within the 2-year time limitation.

Further, in *Matter of Morris Wiseman*, B-182564, November 26, 1975, where the employee requested an extension of time to sell his residence at his old duty station because renovation had not been completed, we held that approval of an extension by the agency was valid even though approved more than 2 years after the effective date of the transfer. In *Wiseman*, we overruled that portion of a prior case, *Matter of Daryl L. Mahoney*, B-181611, December 26, 1974, which stated that an extension must be approved within 2 years of the effective date of the transfer. In overruling that portion of *Mahoney*, we stated that requiring agency review and other administrative appeals to be completed within 2 years is a condition not found in the statute or regulations and would lead to unnecessarily restrictive results.

In the instant case, Mr. Rakous not only purchased his condominium well within the 2-year limitation period, but the agency could have granted an extension if it had received a written request from the employee within the 2-year regulatory period. As noted in 54 Comp. Gen. 553, paragraph 2-6.1e (FTR) (May 1973) does not state when an em-

ployee must make a request for an extension. In view of this and upon further consideration, we conclude that requiring the employee to request an extension of time within the maximum 2-year period allowed for the sale and purchase of residences would be unnecessarily restrictive. Therefore, reimbursement is allowable for expenses incurred in the sale or purchase of a residence where the employee has not requested an extension of time before the expiration of the 2-year limitation period, provided that the sale or purchase itself is completed within 2 years after the date the employee reported for duty at his new official station.

In view of the above, we now hold that FTR paragraph 2-6.1e (May 1973) permits an agency to receive and approve a request for extension filed more than 2 years after the transfer, as long as the real estate transaction itself is completed within 2 years of the employee's transfer. Accordingly, 54 Comp. Gen. 553 is modified. Also, since the Department of the Army has recommended payment of Mr. Rakous' claim incident to the purchase of his residence at his new duty station, it is now allowed.

The case is returned to our Claims Division for preparation of a settlement for reimbursement of real estate expenses incurred by Mr. Rakous in purchasing a residence at his new official station to the extent otherwise proper.

[B-189587]

Small Business Administration—Authority—Small Business Concerns—Determination of Responsibility—Tenacity and Perseverance—Contract Performance.

Protest by small business against contracting officer's determination of non-responsibility because of lack of tenacity and perseverance is dismissed since, pursuant to recent amendment of Small Business Act, Public Law 95-89, section 501. 91 Stat. 553, the matter has been referred for final disposition by Small Business Administration.

In the matter of Multi Electric Manufacturing, Inc., October 14, 1977:

Multi Electric Mfg. Inc. (Multi Electric) protests a determination by the Federal Aviation Administration (FAA) that the firm lacks tenacity and perseverance and therefore is nonresponsible for purposes of Solicitation No. LGM-7-7280B2.

The solicitation provides for 20 each Flasher Light Systems and ancillary items and was issued to 30 prospective small business firms as the repurchase for identical equipment to be delivered under FAA Contract No. DOT-FA76WA-3796 held by Multi Electric. This contract was terminated for default because of Multi Electric's failure to deliver the supplies within the time required.

Since Multi Electric's bid on the reprocurment was lower than its price under the terminated contract, the bid should be considered for award if the firm is determined to be responsible. *PRB Uniforms Inc.*, 56 Comp. Gen. 976 (1977), 77-2 CPD 213. Following opening of bids, the contracting officer determined that the low responsive bidder, Multi Electric, was not a responsible firm in that the firm was lacking in tenacity and perseverance due to its failure to furnish these same supplies under the terminated contract. The determination of non-responsibility, with supporting information, was forwarded to the Small Business Administration (SBA). SBA subsequently indicated its intent to appeal the determination pursuant to Federal Procurement Regulations § 1-1.708-2(a) (5), which permits SBA to register any contrary views prior to resolution of the issue by the head of the procuring activity.

However, prior to final resolution of this matter the Small Business Act was amended to authorize SBA to conclusively determine all elements of responsibility, including the tenacity and perseverance of any small business concern to perform a Government contract. Public Law 95-89, Section 501, 91 Stat. 561, approved August 4, 1977, 15 U.S. Code § 637.

We have been advised by FAA that in view of the recent amendment of the Small Business Act, it is processing a request for a determination of responsibility for final decision by SBA. In view of the statutory authority vested in SBA to conclusively determine such issues, this Office must decline from further consideration of the protest and the matter is dismissed.

[B-183468]

Mileage—Travel by Privately Owned Automobile—Between Residence and Temporary Duty Points—Distance Between Residence and Headquarters—Twenty-Five Mile Point

Decision 55 Comp. Gen. 1323 (1976) disallowed two mileage claims incident to employee's temporary duty because record showed his residence was at Oklahoma City, Oklahoma, his official station, although he had home in Ponca City, Oklahoma, 103 miles distant. Employee, who is in travel status up to 80 percent of the time, has submitted evidence that he rented motel room on daily basis only when he worked in Oklahoma City. Claims are now allowable since additional evidence shows that employee did not have "re-idence" in Oklahoma City within the meaning of the Federal Travel Regulations (FPMR 101-7) (May 1973).

In the matter of Gilbert C. Morgan—reconsideration of claims for mileage and per diem, October 18, 1977:

This decision is in response to a request by Mr. Gilbert C. Morgan, an employee of the Federal Home Loan Bank Board (FHLBB), that we reconsider our decision in *Matter of Gilbert C. Morgan*, 55 Comp.

Gen. 1323 (1976) which involved Mr. Morgan's claims for mileage and per diem incident to temporary duty.

At the time we rendered our decision the record showed that Mr. Morgan, whose duty station was in Oklahoma City, Oklahoma, maintained a residence in Ponca City, Oklahoma, which is approximately 103 miles north of Oklahoma City. The record also indicated that he had a residence at his headquarters, and commuted to work from his residence in Oklahoma City, visiting Ponca City on weekends. Mr. Morgan, who was a Savings and Loan Examiner with the FHLBB, was in travel status up to 80 percent of the time. Agency regulations limited mileage when an employee had a residence 25 miles beyond the corporate limits of the employee's official station. Our decision denied Mr. Morgan mileage and per diem in connection with certain temporary duty assignments. However, Mr. Morgan states that he had no residence in Oklahoma City from which he commuted to work on weekdays and asks us to review our decision.

Mr. Morgan states that when he was on duty in Oklahoma City he stayed exclusively at one of various motels on a daily basis and paid the commercial rate. He also states that he never left any kind of personal property at a motel when he was not a paying guest. Since the original submission did not show Mr. Morgan's Oklahoma address, we asked FHLBB for additional information. We were advised that the agency does not have any evidence which would indicate that Mr. Morgan had established, during the period in question, a residence at his official duty station in Oklahoma City. When an employee is in a travel status a majority of the time, we do not consider the renting of a motel room on a daily basis when he performs work at his official station as constituting a "residence" within the meaning of the Federal Travel Regulations (FPMR 101-7, May 1973). See B-157760, November 16, 1965. Cf. B-176650, February 28, 1973.

An examination of *Morgan, supra*, indicates that the agency regulations were proper for the reasons stated therein. Therefore, we affirm *Morgan* except to the extent that the question of Mr. Morgan's residence was relevant to his entitlement. In this connection a review indicates that our present determination as to residence requires only two changes.

The voucher which had been submitted by Mr. Morgan indicates that on Friday, September 27, 1974, he arrived at the Oklahoma City Airport en route to his residence from a temporary duty trip. He traveled by privately owned automobile from the airport to his residence in Ponca City, 103 miles north of his official duty station, Oklahoma City. He claims 62 miles of reimbursable mileage for this trip.

Federal Home Loan Bank Board Travel Policy Memorandum A-312, at page 3, effective February 1, 1970, defines "official station" as the employee's "residence if within the designated official station or a point not exceeding 25 miles from the corporate limit of the designated official station nearest [the employee's] * * * residence."

Accordingly, the agency computes the mileage entitlement of an employee who does not maintain a residence within the designated "official station" by measuring the distance between the destination or origin of the trip and a point 25 miles from the corporate limits of the city in the direction of the employee's residence (hereinafter "25-mile point").

The record now shows that Mr. Morgan's residence was in Ponca City, Oklahoma, 103 miles north of Oklahoma City. Therefore, as suggested in the original submission, the allowable mileage under the agency's "25-mile point" rule is 48 miles (10 miles from the airport to the center of the city, 13 miles from the center of the city to the outer corporate limits and from the corporate limits to the "25-mile point").

Mr. Morgan's travel voucher also shows that he returned on October 18, 1974, from his temporary duty station in Lawton, Oklahoma, to Ponca City. In accordance with the agency regulation, discussed above, the allowable mileage is the distance from Lawton to the "25-mile point."

The agency should prepare a supplemental voucher in favor of Mr. Morgan in accordance with the above.

[B-145136]

Appropriations—Limitations—Procurement in Economic Distressed, etc., Areas

Prohibition, contained in Department of Defense (DOD) Appropriation Act, of payment of contract price differential for relieving economic dislocations must be given effect notwithstanding earlier amendments to Small Business Act which allows such price differentials to be paid.

Contracts—Awards—Labor Surplus Areas—Set-Asides—Order of Preference

Where Small Business Act amendment sets forth order of preference for procurement set-asides, with first priority for labor surplus area set-asides, and where such labor surplus area set-asides are subsequently prohibited by appropriation act provision, remaining order of preference set forth in Small Business Act is in effect "repealed."

Contracts—Awards—Labor Surplus Areas—Defense Department Procurement—Set-Aside Restriction

While order of preference for procurement set-asides set forth in Small Business Act does not control DOD procurement because of provision in DOD

Appropriation Act, civilian agencies of Government are controlled by such order of preference since DOD Appropriation Act does not apply to them.

Buy American Act—Small Business Concerns—Effect of Appropriation Prohibition—Price Differential Prohibition v. Preference for Domestic Products

Prohibition of payment of price differential for relieving economic dislocations does not conflict with Buy American Act preference for domestic over foreign made products. While an award to a labor surplus area firm in accordance with Buy American Act preference serves to relieve economic dislocations, the price differential is paid for the purpose of preferring domestic products and not to relieve economic dislocations.

In the matter of the Maybank Amendment, October 31, 1977:

By letters dated September 14, and September 22, 1977, the Administrator, Office of Federal Procurement Policy (OFPP), with the concurrence of the Department of Defense (DOD) and the Small Business Administration, has requested our opinion whether changes should be made in the small business and labor surplus area set-aside practices of DOD in light of recent legislation.

As background, the preference for award of Government contracts to small business firms and concerns in labor surplus areas originated in the policies declared in the Defense Production Act of 1950, 50 U.S.C. § 2062, and in amendments thereto, and in various Executive orders and supplementary directives issued to implement those policies. The small business preference was thereafter given more express legislative sanction by the enactment of the Small Business Act of 1953, 67 Stat. 232 (amended in 1958 and redesignated the "Small Business Act," 15 U.S.C. §§ 631 *et seq.*). The labor surplus area award program, however, became the subject of controversy in Congress, resulting in the enactment of the Maybank Amendment in the 1954 Defense Appropriation Act, Public Law 179, Aug. 1, 1953, 67 Stat. 336, and in succeeding DOD appropriation acts. The Maybank Amendment provides that "no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations."

Under existing authority total small business set-aside awards may be made at prices higher than those otherwise obtainable through unrestricted competition, so long as the award prices are reasonable. *See* 41 Comp. Gen. 306, 315 (1961); 31 Comp. Gen. 431 (1952) and *J. H. Rutter Rex Manufacturing Co., Inc.*, 55 Comp. Gen. 902 (1976), 76-1 CPD 182.

In our decision of 40 Comp. Gen. 489 (1961), cited in the Administrator's letter, we considered whether total set-asides for labor surplus area firms would be authorized, in view of the Maybank Amendment,

under criteria similar to those applicable to small business firms. We concluded that in light of the clear intent of the Congress, as expressed in the Maybank Amendment which had been enacted without change in each DOD appropriation act since 1954, a total set-aside based on obtaining only a "fair and reasonable" price violated the prohibition of paying contract price differentials for the purpose of relieving economic dislocations.

As a result, a total set-aside procedure has not been implemented for labor surplus area firms. Rather, the procurement regulations provide for partial set-asides for such firms at prices not higher than those paid on the non-set-aside portions. *See* Federal Procurement Regulations (FPR) §§ 1-1.800 *et seq.*, and Armed Services Procurement Regulation (ASPR) §§ 1-800 *et seq.*

As indicated, while the Maybank Amendment has been regularly included in the annual DOD appropriation acts since 1954, efforts have been made in recent years to authorize total set-asides for labor surplus area concerns. In each of the last 3 years, Senator Hathaway introduced an amendment to the DOD appropriation bill to state explicitly that total labor surplus set-asides are permissible upon a determination that such awards will be made at reasonable prices. *See* 120 Cong. Rec. S12873 (Remarks of Sen. Hathaway) (daily ed. July 27, 1977). These amendments, however, have not been adopted. This year, for example, the Senate on July 19, 1977, approved the amendment, but the amendment was then dropped in conference. (H.R. Rept. No. 95-565, 95th Cong., 1st Sess. 50 (1977)) and the Maybank Amendment prohibition was left intact.

In addition, the OFPP in 1976 requested our opinion as to the propriety of a proposed test procedure within DOD involving total labor surplus area set-asides. Under the proposed approach, the total set-aside would only be made if it were determined that ample competition existed under the set-aside and the award would only be made if the bid prices were determined to be in the "lowest obtainable" category. We approved the proposed test procedure in *Department of Defense's Use of Total Labor Surplus Area Set-Asides*, B-145136, July 2, 1976, 76-2 CPD 5.

Meanwhile, on August 4, 1977, the Small Business Act was amended by Public Law 95-89, 91 Stat. 553 (15 U.S. Code 633), to authorize total labor surplus area set-asides when it is administratively determined that "awards will be made at reasonable prices." Specifically, section 502 of Public Law 95-89 (15 U.S. Code 644) provides, in pertinent part, as follows:

(d) For purposes of this section priority shall be given to the awarding of contracts and the placement of subcontracts to concerns which shall perform a substantial proportion of the production on those contracts and subcontracts within areas of concentrated unemployment or underemployment or within labor surplus areas. Notwithstanding any other provision of law, total labor surplus area set-

asides pursuant to Defense Manpower Policy Number 4 (32A C.F.R. Chapter 1) or any successor policy shall be authorized if the Secretary or his designee specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns that awards will be made at reasonable prices. As soon as practicable and to the extent possible, in determining labor surplus areas, consideration shall be given to those persons who would be available for employment were suitable employment available. Until such definition reflects such number, the present criteria of such policy shall govern.

(e) In carrying out labor surplus areas and small business set-aside programs, departments, agencies, and instrumentalities of the executive branch shall award contracts, and encourage the placement of subcontracts for procurement to the following in the manner and in the order stated :

(1) Concerns which are located in labor surplus areas, and which are also small business concerns, on the basis of a total set-aside.

(2) Concerns which are small business concerns on the basis of a total set-aside.

(3) Concerns which are small business concerns, on the basis of a partial set-aside.

(4) Concerns which are located in labor surplus area on the basis of a total set-aside.

The intent of section 502 was to remove the Maybank Amendment "deterrent" to the labor surplus area set-aside program, as set forth in the GAO decision at 40 Comp. Gen. 489, *supra*. S. Rept. No. 95-184, 95th Cong., 1st Sess. 10-11 (1977). As stated by Senator Hathaway in support of section 502 of the bill :

The clear, unequivocal language in section 502 of the pending measure is not susceptible to any misinterpretation and would require the GAO and all other Federal agencies concerned with procurement to alter their present policies to allow and implement total labor surplus set-asides.

Further, the rules of the Senate support this conclusion since rule 16 prevents any appropriation bill from containing legislative language. 123 Cong. Rec. S12874 (daily ed. July 27, 1977).

Similarly, Congressman LaFalce of New York, speaking in support of the Conference report on the bill, viewed the mandate of section 502 as overriding any provision in an appropriation act. He stated that :

Since it is impermissible by the rules of the House and Senate to legislate in appropriation bills, any legislation restricting section 502's application to all Federal procurement could not be present in an appropriations measure. Accordingly, the Maybank amendment will not serve as a deterrent to the labor surplus policy's implementation on a total set-aside basis in defense or civilian procurement activities. 123 Cong. Rec. H7806 (daily ed. July 26, 1977).

As stated above, section 502 of Public Law 95-89 was enacted August 4, 1977. On September 21, 1977, the Department of Defense Appropriation Act, 1978, was enacted as Public Law 95-111, 91 Stat. 886. Since the Hathaway amendment to section 823 of the DOD Appropriation Bill was not adopted by the conference committee, the Maybank Amendment is included in the usual form in section 823 of Public Law 95-111, 91 Stat. 903.

The OFPP Administrator acknowledges that, on its face, section 823 appears to be inconsistent with the provisions of section 502 of the Small Business Act amendments. He notes that under the general rule of statutory interpretation, the later statute must be construed to repeal any prior inconsistent statute in the absence of a showing

of a contrary legislative intent, and that therefore "it would seem that the Maybank Amendment is controlling with respect to procurements funded by 1978 appropriations." He suggests, however, the argument that our 1961 decision (40 Comp. Gen. 489) "constituted only an interpretation and not a reflection of the Congressional intent as expressed in the language of the Maybank Amendment itself, and that such an interpretation should not continue to govern in the face of the language itself and the clear expression of a contrary Congressional legislative intent in Public Law No. 95-89."

Further, the Administrator suggests that, in any case, the expression of congressional intent in Public Law 95-89 warrants a reconsideration of our 1961 decision which distinguished small business and labor surplus area set-asides and authorized small business set-asides, at least in part, on the basis that Congress had sanctioned total small business set-asides by enactment of the Small Business Act of 1953. In addition, he points out that the two acts (Public Law 95-89 and the 1978 DOD Appropriation Act) should be interpreted so far as possible to avoid any inconsistency "and this can be done by equating the required assurance of a fair and reasonable price under Public Law 95-89 with the prohibition of a price differential under the Maybank Amendment."

Moreover, the Administrator suggests that even if the Maybank Amendment continues to be construed to prohibit total labor surplus area set-asides, this might only affect priorities 1 and 4 of Section 502(e), and that priorities 2 and 3 would not be "repealed" by the Maybank Amendment. On the other hand, the Administrator also believes it could be argued that priorities 1 through 4 "are so inter-related and integrated that they cannot be preserved in part without doing violence to the Congressional intent which * * * was to give greater preferment to labor surplus area firms and not to subordinate them."

In conclusion, the Administrator states that pending our decision in this matter set-asides will continue to be made in accordance with existing regulations rather than on the basis of Public Law 95-89.

Thus, the question raised concerns the relationship between section 502 of Public Law 95-89 and the Maybank Amendment as contained in section 823 of Public Law 95-111. The principle of statutory construction to be applied in such a situation is as follows:

Statutes in *pari materia*, although in apparent conflict, are so far as reasonably possible construed to be in harmony with each other. But if there is an irreconcilable conflict between the new provision and the prior statutes relating to the same subject matter, the new provision will control as it is the later expression of the legislature. 2A Sutherland, *Statutes and Statutory Construction* § 51.02 (4th ed. C. Sands 1973).

To construe sections 502 and 823 harmoniously would require construing "price differential" as having reference to a reasonable price

rather than the lowest obtainable price. To reach this result, we would have to conclude either that our 1961 decision (40 Comp. Gen. 489) was incorrect, or that the Maybank Amendment should be re-interpreted in light of Public Law 95-89.

As discussed above, our 1961 decision concluded that the "price differential" in the Maybank Amendment was to be measured against the lowest obtainable price, a conclusion which we still believe is fully consistent with the fundamental principles of competitive procurement. At this point, it may be useful to restate our 1961 conclusion in more detail:

The language of the proviso leaves little room for doubt, and examination of the legislative history confirms, that the intent of the Congress was that the practice of negotiating contracts with labor surplus area firms which would meet the lowest price offered by any other bidder on a designated procurement might be continued, but that no such contract could be awarded at a price in excess of the lowest available. The prohibition originated as a Senate Committee amendment to the House bill (See S. Rept. No. 601, 83d Cong., 1st sess. p. 11), and in the form proposed by that Committee was apparently intended to prohibit the payment of appropriated funds on any contract negotiated for the purpose of correcting or preventing economic dislocations. On the floor of the Senate a strenuous effort was made to eliminate the proviso, but it was adopted in the form proposed by the Committee. See 99 Cong. Rec. 9499-9508. The House rejected the Senate amendment, and in conference the proviso as finally enacted was substituted. See H. Rept. No. 1015, 83d Congress, 1st session. The intent of the provision is further clarified by debate which occurred in both houses upon adoption of the conference report. See 99 Cong. Rec. 10252-10258; 10342-10348.

On the record we must construe the limitation in question as precluding the expenditure by the defense establishment of appropriated funds under any contract awarded on the basis of a labor surplus area situation at a price in excess of the lowest obtainable on an unrestricted solicitation of bids or proposals. 40 Comp. Gen. 489, 490-491.

It will be noted that the above excerpt is replete with references to legislative history, and we believe our conclusion was compelled by any fair reading of that legislative history. We cannot accept the proposition that our 1961 decision was the result of merely our "interpretation," rather than mandated by congressional intent. In any event, had our 1961 decision been perceived as inconsistent with congressional intent, the Maybank Amendment could readily have been revised, as suggested by Senator Hathaway, to negate the effect of our decision. The continued reenactment of the Maybank Amendment without change must therefore be viewed as further indication that our decision was in fact an accurate reflection of congressional intent. See *Shapiro v. United States*, 335 U.S. 1, 16 (1947).

In analyzing the effect of the inclusion of the Maybank Amendment in Public Law 95-111, it is of course important to consider that the Congress had very recently enacted section 502 of Public Law 95-89. In view of the legislative history of Public Law 95-89 as discussed above, it is clear beyond question that section 502 was intended to eliminate the effect of the Maybank Amendment. The legislative history of section 823 of Public Law 95-111, as it might

relate to section 502, however, is sparse. The original House bill (H.R. 7933) had included the Maybank Amendment in its traditional form. Since this involved no change from prior years, there was no comment in the report of the House Appropriations Committee (H.R. Rept. No. 95-451). The Senate adopted the Maybank Amendment with the additional language proposed by Senator Hathaway, as follows:

Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations, *except that nothing herein shall be construed to preclude total labor surplus set-asides pursuant to Defense Manpower Policy No. 4 (32A C.F.R. Chapter 1) or any successor policy if the Secretary or his designee specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards will be made at reasonable prices.* (Sen. Hathaway's language italicized.)

The Senate Committee on Appropriations noted:

Without this additional language, a GAO interpretation of the language in the House Bills, the so-called Maybank Amendment prohibiting the payment of price differentials on Defense contracts, restricts the flexibility of the Secretary of Defense in this area. S. Rept. No. 95-325, 95th Cong., 1st Sess. 283 (1977).

The House version was adopted in conference. The conference report noted merely that "The conferees agreed to delete language proposed by the Senate which would have allowed for the set-aside of Defense contracts to labor surplus areas." H.R. Rept. No. 95-565, 95th Cong., 1st Sess. 50 (1977). In presenting the conference report to the full Senate on September 9, Senator Stennis noted the conference action without further comment. 123 Cong. Rec. S14486 (daily ed. September 9, 1977). Thus, the fact remains that the Maybank Amendment was enacted in its traditional form several weeks after the enactment of Public Law 95-89.

For several reasons we do not believe it would be proper now to engraft a different interpretation upon the language of the Maybank Amendment. First, as discussed above, the legislative history of Public Law 95-111 affords no support for any such reinterpretation. Next, the language of the Amendment as contained in section 823 is no different from that used in previous years. Finally, and most significantly, Senator Hathaway's revision to the Maybank Amendment, which was designed to serve the same purpose as section 502, and which had been proposed but not enacted in several previous years, was once again in 1977 expressly deleted in conference with the traditional language left intact. There is no indication, either in the conference report itself or in the ensuing floor debates on the conference report, that the Hathaway language was deleted because it was deemed unnecessary in light of Public Law 95-89. Therefore, we can find no legal basis to conclude that language which has had a recognized meaning

for many years should now be given a different meaning. To conclude otherwise would be to view the Maybank Amendment without the Hathaway language as having the same meaning as the Maybank Amendment with the Hathaway language.

Accordingly, we feel compelled to conclude that the Maybank Amendment as contained in section 823 of Public Law 95-111 and viewed in its historical context must prevail as the later expression of Congress.

It has been suggested that the Maybank Amendment is rendered ineffective by virtue of Senate Rule XVI and House Rule XXI, which prohibit the inclusion of general legislation in appropriation bills. At the outset, we would note that it is far from clear that the Maybank Amendment constitutes "general legislation." It certainly may be argued the Maybank Amendment is a condition on the availability of the appropriation, which is clearly within the congressional prerogative. In any event, the effect of Senate Rule XVI and House Rule XXI, if they are applicable, is merely to subject the given provision to a point of order (a procedural objection raised by a congressman alleging a departure from rules governing the conduct of business). If a point of order is not raised, or if one is raised but not sustained, the validity of the provision, if enacted, is not affected. The cited rules have no application once the legislation has been enacted.

Also, the validity of section 823 cannot be questioned merely because it is contained in an appropriation act or because of the language "not withstanding any other provision of law" in section 502. In 1966, for example, we advised Chairman Mahon of the House Committee on Appropriations that:

It is fundamental * * * that the Congress is not bound by a statute enacted by it earlier in the same session and that the Congress has full power to direct the purposes for which an appropriation shall be used. This authority is exercised as an incident to the power of the Congress to appropriate and regulate expenditure of the public money. B-160032, September 13, 1966.

See also *United States v. Dickerson*, 310 U.S. 554, 555 (1940).

In addition, we do not believe that priorities 2 and 3 as set forth in the amendments to the Small Business Act remain unaffected by the Maybank Amendment. Section 502(e) of Public Law 95-89, as indicated above, furnishes a listing of priorities for contract award and states "the executive branch shall award contracts, and encourage the placement of subcontracts for procurement * * * *in the manner and order stated * * **" [Italic supplied.] While priorities 2 and 3 do not themselves relate to labor surplus area set-asides, they are listed following the initial statutory preference for firms located in labor surplus areas. If priorities 2 and 3 are not "repealed," they would in practical effect become priorities 1 and 2, respectively. The conse-

quence is that awards would not be made "in the manner and order stated." Moreover, this would alter the current regulatory preference for combined small business and labor surplus area set-asides (*see* ASPR § 1-706.1) in favor of small business concerns on the basis of a total set-aside (priority 2 of Public Law 95-89). As the Administrator suggested, this would do violence to the congressional intent expressed in Public Law 95-89, of which the clear legislative purpose was to enlarge the preference for labor surplus area firms and not to subordinate them.

To reiterate, we believe the Maybank Amendment in section 823 must prevail as the later expression of Congress. The effect of this is to suspend section 502 of Public Law 95-89 with respect to funds appropriated by Public Law 95-111. Accordingly, the small business and labor surplus set-aside practices of DOD should not be changed to conform with section 502 of the Small Business Act amendments.

At the same time it is clear that the civilian agencies of the government are subject to the provisions of Public Law 95-89, since the Maybank Amendment applies only to the Department of Defense. We realize that prior to the enactment of Public Law 95-89 the civilian agencies, as well as the military departments, in accordance with the provisions of Defense Manpower Policy No. 4 (32A C.F.R. Chapter 1), were precluded from instituting total labor surplus area set-asides. Public Law 95-89, which is applicable to the civilian agencies, *requires* that set-asides, as set forth in section 502 be made under the circumstances set forth in subsection (d) of section 502.

Finally, OFPP has also questioned whether the Maybank Amendment bears upon the preferential treatment for American products that is afforded under the Buy American Act, 41 U.S.C. 10a-d. Under the executive implementation of the Buy American Act, price differentials may be paid to achieve the required preferences for American products. In fact, under existing regulations the price differential which may be allowed between the cost of a foreign product and the American product will be increased if the firm submitting the low acceptable domestic bid is a small business concern or a labor surplus area concern. FPR § 1-6.104-4(b) and ASPR § 6-104.4(b).

Nevertheless, we see no basic conflict between the two provisions of law. The stated purpose of the Maybank Amendment is to prohibit the payment of a contract price differential for relieving economic dislocations. The Buy American Act preference, on the other hand, is for the purpose of preferring domestic products over foreign made products. We recognize that the two purposes may overlap in that an award to a labor surplus area firm in accordance with the Buy American Act preference serves to relieve economic dislocations. The price differential, however, is paid for the purpose of preferring domestic products and not to relieve economic dislocations.